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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

JOSEPH M. HUDSPETH, PETITIONERS

v.

NORTH MISSISSIPPI SAVINGS & LOAN ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner must contest a federal receiver's termination of his consulting contract with a failed savings and loan association initially in the receivership proceedings, rather than in independent judicial proceedings.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 756 F.2d 1096. Its prior opinion (Pet. App. 10a-21a) was withdrawn and is unreported. The opinions of the district court (Pet. App. 22a-28a, 29a-31a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 32a-33a) was entered on May 23, 1985. The petition for a writ of certiorari was filed on August 21, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case presents a dispute between the Federal Savings and Loan Insurance Corporation (FSLIC), acting as federal receiver for the North Mississippi Savings and Loan Association (Old North), and petitioner Joseph M. Hudspeth, Old North's former president, concerning the FSLIC's termination of a purported consulting agreement between petitioner and Old North (Pet. App. 2a).

1. Petitioner claims that Old North, a Mississippi-chartered savings and loan association, agreed in 1977 to provide him lifetime monthly payments as deferred compensation under a consulting contract (Pet. App. 2a; see Pet. 4). In 1982, Old North filed an action in a state court seeking a declaration that the purported contract either did not exist or was terminable (Pet. App. 2a, 22a). Hudspeth filed a counterclaim asserting the validity of the contract (*ibid.*). On April 11, 1983, while that suit was pending, the State of Mississippi placed Old North into receivership. The Federal Home Loan Bank Board (Bank Board) "federalized" the receivership and appointed the FSLIC as federal receiver for Old North (Pet. App. 2a, 22a-23a).[1] Upon its appointment, the FSLIC transferred most of the assets and liabilities of Old North—but not petitioner's purported contract—to a new federally-chartered institution, New North Mississippi Federal Savings and Loan Association (New North). *Id.* at 2a-3a, 23a

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[1] The Bank Board is an independent agency in the Executive Branch of the United States that is responsible, pursuant to Section 5 of the Home Owners' Loan Act of 1933, 12 U.S.C. (& Supp. II) 1464, for the "organization, incorporation, examination, operation, and regulation" of federal savings and loan associations. 12 U.S.C. 1464(a). The Bank Board is also the operating head of the FSLIC, a corporate governmental agency that is responsible, pursuant to Title IV of the National Housing Act, 12 U.S.C. 1724 *et seq.*, for insuring the accounts of all federally-chartered savings and loan associations and most state-chartered savings and loan associations.

& n.2. The FSLIC then notified petitioner that all consulting contracts were terminated (*ibid.*; see Pet. 4-5). The Bank Board appointed a conservator to run New North (Pet. App. 2a, 23a).

The FSLIC unsuccessfully moved the state court to dismiss the pending action concerning petitioner's purported contract (Pet. App. 3a, 23a). Petitioner then amended his counterclaim, adding New North as a "transferee in interest" under state law, and sought actual and punitive damages from both New North and Old North (*ibid.*). The FSLIC and New North removed the action to the United States District Court for the Northern District of Mississippi and moved to dismiss. Petitioner sought remand of the action to state court (*ibid.*).

2. The federal district court held that the action was properly removed and that the FSLIC's termination of all consulting contracts mooted petitioner's counterclaim (Pet. App. 24a-27a). It ruled that petitioner should present his grievances in the federal receivership proceedings, which are subject to Bank Board and judicial review (*id.* at 26a-27a).

The court of appeals initially issued a decision affirming, in part, the district court decision (Pet. App. 10a-21a). Upon petition for rehearing, the court of appeals vacated its previous decision and entered a decision affirming the district court in full (*id.* at 1a-9a). It concluded that the removal was proper (*id.* at 5a). It further held that the FSLIC's termination of petitioner's purported contract "was unquestionably an exercise of the FSLIC's powers as a receiver, analogous to a trustee's rejection of a contract in a bankruptcy proceeding" (*id.* at 7a). The court noted that petitioner should present his claims in the receivership proceedings, which provide a comprehensive claims determination procedure subject to administrative and judicial review (*id.* at 8a-9a).

ARGUMENT

The court of appeals correctly affirmed the district court's dismissal of petitioner's counterclaim.[2] The decision does not conflict with the decisions of this Court or of any other court of appeals.[3] Accordingly, further review by this Court is not warranted.

1. Contrary to petitioner's contentions (Pet. 6-9), the court of appeals' decision is consistent with the applicable statutes, the Bank Board's regulations, and accepted receivership principles.

a. Congress has vested the Bank Board with broad responsibility for regulating federally insured savings and loan associations and maintaining public confidence in the thrift industry. See *Fidelity Federal Savings & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141 (1982). The Bank Protection Act of 1968, Pub. L. No. 90-389, 82 Stat. 294 *et seq.*, specifically empowers the Bank Board to appoint the FSLIC as receiver for federally-insured, state-chartered,

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[2] Petitioner has limited his petition to a challenge of that ruling. He has not taken exception to the court of appeals' determination that removal was proper.

[3] No other federal appellate court has considered the issue that petitioner presents in this case. Petitioner claims (Pet. 11 n.2) that a conflict exists between this case and a state trial court decision. (*American Savings & Loan Ass'n* v. *San Marino Savings & Loan Ass'n*, No. 179526 (Cal. Super. Ct. May 28, 1985)). However, that decision, presently on appeal, relied upon the Fifth Circuit's original opinion in the present case, which was withdrawn on May 23, 1985. See Pet. App. 34a. One other court relied on the original decision prior to its withdrawal. *Gilbralter Bldg. & Loan Ass'n* v. *State Savings & Loan Ass'n*, 607 F. Supp. 722 (N.D. Cal. 1985). However, the lower courts have since uniformly followed the Fifth Circuit's revised opinion. See, *e.g.*, *Chupik* v. *FSLIC*, Civ. No. 3-84-1566-H (N.D. Tex. Oct. 22, 1985); *FSLIC* v. *Forde*, No. CV 85-774-WMB (C.D. Cal Sept. 19, 1985); *The Brook VI Condominiums, Ltd.* v. *FSLIC*, No. 84-7217-E (Tex. Dist. Ct. May 30, 1985).

savings and loan associations experiencing financial distress. See 12 U.S.C. 1729(c). Congress authorized FSLIC receivership to ensure the safety of the FSLIC's insurance program, noting that "if the ability of the FSLIC to meet its insurance commitments is ever called into question, there would be grounds for serious public concern." S. Rep. 1263, 90th Cong., 2d Sess. 6 (1968).[4]

The FSLIC, as receiver, is empowered by statute to liquidate a failing institution in an orderly manner. 12 U.S.C. 1729(b)(1)(A) and (c)(1)(A). Acting much like a trustee in bankruptcy, it marshals the assets of the institution and pays "all valid credit obligations," to the extent of available assets and according to the priorities of the obligations. See 12 U.S.C. 1729(b)(1)(A) and (B); 12 C.F.R. 569a.4–569a.12. The FSLIC, like a bankruptcy trustee, may settle or compromise claims (12 U.S.C. 1729(d); 12 C.F.R. 569a.6(c)(2)), reject contracts, (12 C.F.R. 569a.6(c)(3)), and allow timely claims proved to its satisfaction (12 C.F.R. 569a.8(b)).

Congress thus centralized control of federal savings and loan receiverships in the FSLIC, subject to Bank Board oversight. Congress also gave the FSLIC broad powers to take such actions "that may be necessary in connection [with the liquidation], subject only to the regulation of the Federal Home Loan Bank Board." 12 U.S.C. 1729(d). It specifically stated that "no court may take any action for or toward the removal of any * * * receiver, or, except at the instance of the Board, restrain or affect the exercise of

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[4] As the Senate report explained (S. Rep. 1263, *supra*, at 7):

> In most receivership cases, upward of 95 percent of an association's liabilities are to the FSLIC. Thus, the FSLIC has a vital stake in the proper management and disposal of the assets of an association in receivership.

Congress was well aware that "[t]he reserves of the FSLIC are not unlimited and cannot stand on indefinite repetition of unrecovered receiverships." *Id.* at 8.

powers or functions of a * * * receiver." 12 U.S.C. 1464(d)(6)(C).[5] The Bank of Board's supervision of the FSLIC receivership is ultimately subject to judicial review under the Administrative Procedure Act, 5 U.S.C. (& Supp. II) 701-706. See *First Savings & Loan Ass'n* v. *First Federal Savings & Loan Ass'n*, 531 F. Supp. 251, 254 (D. Hawaii 1981). However, the receivership proceeding, like a bankruptcy proceeding, is the forum of first resort for determination of creditor-debtor obligations. Cf. 11 U.S.C. (& Supp. II) 362 (automatic stay provisions of the Bankruptcy Code).

The relevant statutes and regulations thus demonstrate that the court of appeals was plainly correct in affirming the district court's dismissal of petitioner's state court action. The FSLIC acted well within its authority in terminating petitioner's purported contract. 12 C.F.R. 569a.6(c)(3). The termination of the contract, in turn, mooted petitioner's state court action seeking a declaration of the contract's validity. If petitioner wishes to pursue payment under the purported contract, he must submit a timely claim to the receiver, like any other potential creditor. 12 C.F.R. 569a.8. He cannot pursue a claim outside the receivership proceeding; the courts are precluded

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[5] Congress fully recognized that the FSLIC would conduct its receivership responsibilities on behalf of all creditors and that creditors, in turn, would submit their claims to the FSLIC rather than pursue separate court actions against the debtor association. Thus, the Senate report states that the FSLIC should—

> give due consideration to the interest of all of the claimants upon the assets of the association, including general creditors, uninsured depositors, and association stockholders. The authority of the FSLIC in this regard would be subject only to the regulation of the Federal Home Loan Bank Board and not to that of any State authority, administrative or judicial, which may previously have had regulatory authority with respect to the institution.

S. Rep. 1263, *supra*, at 10.

from resolving petitioner's claim because that action would "affect the * * * powers or functions of a * * * receiver." 12 U.S.C. 1464(d)(6)(C).

b. Petitioner, relying on *Riehle* v. *Margolies*, 279 U.S. 218 (1929), mistakenly argues that the court of appeals' decision conflicts with "traditional receivership law" (Pet. 7). *Riehle* held that "the appointment by a federal court of a receiver on a creditor's bill gives it no right to stay a suit then pending in state court" (*id.* at 226), reasoning that "a federal court sitting in equity * * * lacks the power to stay an action in state court" (*id.* at 228). *Riehle* is distinguishable form the present case in at least two respects. First, petitioner's suit has been mooted by the FSLIC's termination of his purported consulting contract. Thus, petitioner can raise no justiciable claims in federal or state court. He can challenge the FSLIC's termination of his purported contract and submit a claim, against Old North, but those matters are properly raised in the receivership proceeding. See 12 C.F.R. 569a.8. Second, unlike the case of equitable receiverships, Congress has expressly provided that the federal and state courts may not take actions that would "affect the * * * powers or functions of a * * * receiver." 12 U.S.C. 1464(d)(6)(C). As previously noted, Section 1464(d)(6)(C) is intended to function much like the Bankruptcy Code's automatic stay, establishing the receivership proceeding as the central forum for consideration of creditor claims. Indeed, *Riehle* acknowledged that Congress may enact such provisions requiring potential claimants to submit their claims, in the first instance, to a federal trustee or receiver. 279 U.S. at 228. See also *Morris* v. *Jones*, 329 U.S. 545, 552-553 (1947).[6]

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[6] The cases cited by petitioner (Pet. 7) do not support his position. In *FSLIC* v. *Krueger*, 435 F.2d 633 (7th Cir. 1970), the court simply held that the FSLIC, which had been appointed receiver of a state-chartered association by a state court, could attempt to recover assets in the federal courts. In *Hancock Financial Corp.* v. *FSLIC*,

2. In contending (Pet. 9-10) that the court of appeals' construction of the federal receivership scheme "effectively repeals" 12 U.S.C. 1730(k)(1), petitioner misinterprets both the statutory provision and the court's judgment.

Section 1730(k)(1) is a jurisdictional statute outlining the circumstances in which a suit involving the FSLIC arises under federal law and might be removed to federal court. Yet petitioner does not challenge the court of appeals' determination that federal jurisdiction existed and that removal was proper.[7] Instead, petitioner argues that the court has "repealed" Section 1730(k)(1) by rendering it superfluous; he contends that its decision effectively requires the dismissal of all actions, brought in state court, against savings and loan associations in receivership. The court's decision, however, does not reach that far. It affirms the dismissal of a plainly moot controversy that, even if justiciable, would obstruct efficient exercise of the FSLIC's receivership responsibilities (Pet. App. 9a; see *id.* at 26a-27a). The decision does not state that all state court actions against FSLIC receivers must be dismissed. For example, when the FSLIC serves as a state-appointed

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492 F.2d 1325 (9th Cir. 1974), the court held that the FSLIC, when acting as a state-court appointed receiver, is subject to regulation by the court that appointed it. Indeed, *Hancock* supports the principle advanced by the FSLIC: challenges to the FSLIC's receivership activities must be addressed to it in the first instance, followed by further review, if necessary, by the authority that appointed it—in this case, the Bank Board, which, in turn, is subject to judicial oversight. The other cases petitioner cites do not involve FSLIC receiverships and are simply inapposite.

[7] That ruling was correct. As the lower courts noted, petitioner's amended counterclaim was brought against the FSLIC, Old North, and New North, and included challenges to the FSLIC's termination of petitioner's contract and the transfer of assets from Old North to New North (Pet. App. 4a-6a, 24a-26a, 30a). Because the suit involved federal issues implicating third parties, removal was plainly appropriate. 12 U.S.C. 1730(k)(1).

receiver, it remains subject to state court actions that cannot be removed or dismissed under Section 1730(k)(1).[8]

3. Petitioner characterizes the FSLIC as pursuing "a nationwide policy of refusing to allow litigation of claims against associations in receiverships." Pet. 11. Actually, the FSLIC is simply administering its receivership responsibilities according to the terms that Congress and the Bank Board have established. Congress recognized that the FSLIC is invariably, and by far, the largest creditor of a failed savings and loan association. S. Rep. 1263, *supra*, at 7. It also recognized the huge financial burden that liquidation delays place on the FSLIC. *Id.* 7-9. Thus, as the court of appeals explained (Pet. App. 7a):

> Congress wanted the FSLIC to be able to act quickly and decisively in reorganizing, operating, or dissolving a failed institution, and intended that the FSLIC's ability to accomplish these goals not be interfered with by other judicial or regulatory authorities.

Congress and the Bank Board have provided a comprehensive, uniform, and efficient claims procedure that can fully and fairly address petitioner's claim. Further litigation of petitioner's purported contractual rights, after the FSLIC has terminated the contract, is a wasteful and

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[8] Petitioner suggests that "it is unlikely there will ever again be 'state' FSLIC receivers to be involved in lawsuits involving only state law claims" (Pet. 9). However, federal law continues to permit appointment of FSLIC receivers by state authorities (12 U.S.C. 1729(c)(1)(A)) and subjects the FSLIC to the regulation of "the court or other public authority having" jurisdiction over the matter. 12 U.S.C. 1729(d). It is far from clear that the FSLIC will always choose to "federalize" a state receivership. See S. Rep. 1263, *supra*, at 9. And even if it does, it would simply be exercising an option that Congress unequivocally provided. Thus, if this option reflects an "effective repeal" of Section 1730(k)(1), it is a "repeal" authorized by Congress.

unnecessary exercise that interferes with the prompt and orderly liquidation of the failed institution.[9]

Nor can petitioner point to any other consideration warranting this Court's review. As a practical matter, customers and claimants of failed savings and loan associations generally welcome the FSLIC's efficient claims administration procedures. Thus, in the 15 years since the passage of the Bank Protection Act, there has been relatively little litigation resisting FSLIC proceedings. And, as petitioner conceded (Pet. 11), the court's decision in this case does not conflict with any decision of another court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submited.

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NOVEMBER 1985

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[9] The burdens placed on the receivership—and, consequently, on the failed institution's creditors—are apparent. Federal and state court resolution of claims against a receivership estate could result in protracted delays and inconsistent determinations. Moreover, the costs of litigating claims around the country would be borne by the receivership estate, reducing creditors' pro rata recoveries. By contrast, the administrative process contained in the Bank Board's regulations is efficient, is far less susceptible to inconsistent results, avoids large legal expenses, and is ultimately subject to judicial review.